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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 340

LEE F. WEILER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HIRSH W. STALBERG,
PETER P. ZION,
Counsel for Petitioner.

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THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Lee F. Weiler, by his attorney, Peter P. Zion, Esq., respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Circuit Court of Appeals for the Third Circuit in the above entitled case, affirming a decision of the United States

District Court for the Eastern District of Pennsylvania, which judgment and decision was rendered by the Circuit Court of Appeals on May 31, 1944, amended in an order amending the opinion and denying the rehearing under date of July 10, 1944.

The appeal in the Circuit Court of Appeals was taken from the judgment of the United States District Court for the Eastern District of Pennsylvania after verdict of guilty by a jury, which judgment imposed sentence upon and ordered commitment of the defendant below (appellant in the Circuit Court of Appeals and petitioner herein), upon an indictment for perjury.

Statement of the Matter Involved.

This case involved:

(a) The construction and procedural application of the two-witness rule in perjury cases;

(b) The construction and application of the rule of evidence relating to the propriety of a conviction upon indictment and proofs in perjury cases; and

(c) The construction and application of the rule as to the materiality of subject matter in a trial, the testimony in regard to which subject matter was the basis of the perjury charge.

The indictment for perjury was based upon testimony of the petitioner, Weiler, in a trial wherein he and one Evans were indicted for

A. Unlawfully concealing facts in a matter within the jurisdiction of the United States or an agency thereof, and

B. Conspiring to defraud the United States, to wit, making false representation in a matter within the

jurisdiction of the United States or an agency thereof (R. 105-114).

There were four counts in the indictment. At the trial of the cause before His Honor, Harry E. Kalodner, Judge of the District Court, a verdict of not guilty was directed (R. 13) as to Counts III and IV. Count I charged the defendant with falsifying, concealing and covering up by a trick, etc., to wit, by a false and fraudulent sales invoice, a material fact in a transaction involving the sale of new rubber tires and tubes (R. 107-8). Count II charged the defendants with conspiring to defraud the United States by concealing and transferring new rubber tires and tubes in contravention of a regulation of the Office of Price Administration (R. 109).

Paragraphs 10 and 11 of Count II charged that it was a part of the conspiracy that defendants would not file an inventory of new rubber tires and tubes as of December 12, 1941, required to be filed on Form PD 216 on or before December 31, 1941; and on or before December 31, 1941, the defendants knowingly and wilfully failed to file such inventory (R. 110-11).

The jury acquitted the defendants on Counts I and II and they were accordingly adjudged not guilty (R. 13).

In this earlier case, hereinafter sometimes referred to as the "OPA case", Weiler took the witness stand in his own defense, and the present perjury case arose out of testimony given by Weiler on cross-examination in connection with the nonfiling of Form PD 216 referred to in Count II above. As to the specific matter charged in Count II of the indictment in the OPA case, viz., the wilful failure to file Form PD 216 on or before December 31, 1941, showing an inventory of new rubber tires and tubes as of December 12, 1941: Weiler satisfactorily explained that he did not receive Form PD 216 until January 5, 1942 (sub-

sequent to the filing date), and that he did not therefore file it (R. 121). As stated above, the appellant was acquitted of this charge. However, Judge Kalodner, while inquiring into this matter during the Government's cross-examination of Weiler, brought out that a report on Form PD 216 had to be filed every three months (R. 121). In reply to a direct question by Judge Kalodner, the appellant stated that he did not file a report on Form PD 216 for the first three months of 1942 because "• • • that was in March and I had no tires then" (R. 122). It was this question of Judge Kalodner's that was the springboard of the present perjury case.

Subsequently Weiler testified upon cross-examination that he did not buy tires in March, 1942 (R. 122). It transpired upon further cross-examination that Weiler had participated in a tire transaction in March, 1942, with United Petroleum Co., wherein he appeared to be the purchaser; but he explained that he had been the nominal purchaser only; that he had not bought the tires for himself; that payment for the tires simply represented a loan to one Roatche (known as Dan The Tire Man), and that he, Weiler, had never received the tires, and had not purchased them for his own use; and that in saying that he had not purchased the tires, he said so because his notion of a purchaser was that of one who paid for and received the tires (R. 123-46 passim).

In the course of the cross-examination, Weiler testified more particularly that United Petroleum Co. had certain new tires in its possession which its tire manager, Bernard E. Sweeney, wanted to sell. Roatche wanted to acquire these tires and Weiler was asked to finance and be the middleman in the transaction (R. 126-128, 131). Sweeney and Roatche had done business together before and were very friendly (R. 141-142). Weiler, as a distributor, had

a right under the rationing program to buy tires from United, but Roatche, as a dealer, could not buy them at the same price (R. 143). The appellant agreed to be the nominal purchaser (e.g. R. 126, 127, 129). The appellant loaned Roatche the necessary money (R. 131, 132 and 134); he had financed Roatche in other instances (R. 135, 140). This was all done, and Roatche returned appellant's money (R. 131).

Following acquittal in the OPA case, the appellant was indicted for perjury in May, 1943. The indictment charged Weiler with having testified falsely under oath in that in the OPA case he testified to certain material matters which he did not believe to be true, and which he knew to be false. In particularly setting forth the false oath, the indictment went on to quote excerpts from the testimony described above. The excerpts included not only the Weiler assertion that he had not bought tires in March, 1942, but also his subsequent explanations, qualifications and statements that although he appeared as a purchaser in the United Petroleum transaction, he nevertheless was not the real purchaser; that he had signed the order for the tires in question for the accommodation of Roatche, to whom he in effect advanced the purchase price of the tires as a loan, which loan was repaid to him by Roatche (R. 3-11). The indictment alleged that in so testifying Weiler knew the truth to be that he had purchased the tires in March, 1942, from United Petroleum; that he had accepted delivery of the tires; that he had paid for them; that he had not loaned the money for the purchase of the tires, and that he had not acted as an accommodation party to the transaction (R. 10-11).

At the trial of the perjury case the Government's evidence boiled down to this:

(a) Representatives of the United Petroleum testified that Weiler had purchased the tires from the Company (R. 41-45) and eight days later at the request of United Petroleum had written a letter so stating (R. 27, 147), so that United could show OPA that a competent person had purchased the tires (R. 28).

(b) Sweeney of United Petroleum testified that at Paulsboro, N. J., United Petroleum delivered the tires to Evans, employee of Weiler, who loaded them upon a truck which Sweeney had previously seen in and around Weiler's public garage (R. 41-45).

(c) Roatche testified that he was not involved in the tire transaction, and that Weiler did not loan him the money for it (R. 59-61), although admitting that he was with Evans when United delivered the tires to Evans (R. 61) and helped load the tires on the truck (R. 62); he went along because he had nothing else to do (R. 62).

For the defense Weiler repeated the story he had told in the OPA case (R. 73-91).

At the conclusion of the trial, defendant's counsel in writing requested the court to charge as follows:

> "(8) The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find defendant not guilty" (R. 103).

The request was denied (R. 100) and not in any way covered or adverted to in the charge.

Motions in arrest of judgment (R. 166) and for a new trial (R. 151) were denied, and Weiler was sentenced to jail for a year and a day (R. 167). Weiler appealed to the Circuit Court of Appeals (R. 186), which affirmed (R. 204).

In affirming, Maris, J., who wrote the majority opinion, held that refusal of the trial judge to instruct the jury on the two-witness rule in perjury cases was not error; and further *that not only was it unnecessary so to instruct the jury, but that the instruction "would impede rather than aid them in reaching a right decision"*; that in effect a defendant was not entitled to such instruction under *any* circumstances, and that the requirements of justice would better be met by withholding rather than stating such instruction (R. 195-6).

Bard, J., in a concurring opinion (R. 200), based his concurrence principally on the opinion of the United States Supreme Court in the case of *Goins* v. *United States*, 306 U. S. 622, 59 S. Ct. 783, 83 L. Ed. 1027, *interpreting that decision to mean that under no circumstances was such a refusal to instruct* (upon the two-witness rule in perjury cases) *reversible error.*

Neither the majority nor the concurring opinion held the alleged error harmless or nonprejudicial.

Jones, J., dissenting (R. 201), furnished an analysis of the legal problem involved, and concluded that the refusal to grant the instruction requested was reversible error. In the last paragraph of his opinion, he pointed out the error was prejudicial, unlike the Goins case (R. 203-4).

Upon the question of materiality of subject matter, concerning which allegedly false testimony was given, Maris, J., in the majority opinion, while conceding the rule of materiality, held that the subject matter of the testimony was material within the meaning of the Federal Perjury Statute. That phase of the case was not touched upon in either the concurring or dissenting opinions.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of

February 13, 1925 (43 Stat. 938, U. S. C., Title 28, Sec. 347).

The judgment of the United States Circuit Court of Appeals for the Third Circuit to be reviewed was entered on May 31, 1944 (R. 204); opinion amended and rehearing denied July 10, 1944 (R. 225).

Questions Involved.

(a) Is a defendant indicted for perjury *never* entitled upon request to have the trial court instruct the jury upon the so-called two-witness rule in perjury cases?

(b) Whether a conviction for perjury may be sustained upon an indictment charging, and proofs showing, not only the contradictory statements of the defendant, but also the qualifications and explanations accompanying them?

(c) Whether the court below, in holding material the matters, the testimony regarding which is the basis for the perjury charge, did not so strain the concept of materiality as to constitute or create a departure from the materiality rule in perjury cases in force in the Third Circuit and in other Circuits?

Reasons Relied On for Allowance of Writ.

A. In holding that under no circumstances is a defendant indicted for perjury entitled to have the jury instructed on the two-witness rule in perjury cases, and that such instruction would impede rather than aid a jury in arriving at its verdict, the Circuit Court of Appeals for the Third Circuit

1. has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter: Goins vs. U. S. 99 Fed. (2d) 147 (4th Cir.); Allen vs. U. S. 194 Fed. 664 (4th Cir.); Pawley vs. U. S. 47 Fed. (2d) 1024 (9th Cir.);

2. has decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States;

3. has decided a federal question in a way probably in conflict with applicable decisions of the Supreme Court of the United States: Goins vs. U. S., 306 U. S. 622, 59 S. Ct. 783, 83 L. Ed. 1027;

4. has divided its opinion, in that two judges (Maris and Bard, J. J.) voted for affirmance, and one judge (Jones, J.) voted for reversal.

B. In holding that a conviction for perjury may be sustained upon an indictment charging, and proofs showing, not only contradictory statements of the defendant, but also the qualifications and explanations accompanying them,

1. the Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter: Fotie vs. U. S., 137 Fed. (2d) 831, 840.

C. In holding the subject matter of the testimony constituting the basis of the perjury charge to be material, the Circuit Court of Appeals for the Third Circuit

(1) has so strained the concept of materiality in perjury cases as to render a decision in conflict with the decision of other Circuit Courts of Appeals on the same matter: Clayton vs. U. S. 284 Fed. 537 (4th Cir.); Blackmon vs. U. S., 108 Fed. (2d) 572 (5th Cir.);

(2) has rendered a decision in a way probably in conflict with its own prior decisions: Melaragno vs. U. S., 88 Fed. (2d) 264, and Verro vs. U. S., 95 Fed. (2d) 504.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals

for the Third Circuit, sitting at Philadelphia, Pennsylvania, commanding that Court to certify and to send to this Court on a day certain to be therein named a full and complete transcript of the record and all proceedings had in this case numbered and entitled on its docket October Term, 1943, No. 8496, to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Circuit Court of Appeals for the Third Circuit may be reversed by this Court; and that your petitioner may have such other and further relief in the premises as may seem just and proper.

And your petitioner will ever pray.

HIRSH W. STALBERG,
PETER P. ZION,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 340

LEE F. WEILER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

No opinion was written by the District Court. The opinion of the Circuit Court of Appeals for the Third Circuit appears in the record at page 190. The concurring opinion appears at page 200. The dissenting opinion appears at page 201. None of the foregoing opinions has yet been reported in the official reports.

Jurisdiction.

The grounds on which jurisdiction of this Court is invoked are set forth in the petition at pages 7-8 thereof.

Statement of the Case.

The statement of the case appears in the petition at pages 2 to 7, and in the interest of brevity is not repeated herein.

Specifications of Errors.

The errors which petitioner will urge, if writ of certiorari be granted, are that the Circuit Court of Appeals for the Third Circuit erred

1. In affirming the judgment of the District Court;

2. In holding that under no circumstances is a trial judge required upon request to instruct the jury as to the two-witness rule in perjury cases;

3. In holding that the conviction could be sustained notwithstanding the character of the indictment and the proofs involving, as they did, the explanations and qualifications to the contradictory statements of the petitioner (as more fully set forth in the statement of the case and reasons for allowance of writ in the foregoing petition);

4. In holding that the subject matter of the testimony charged to be perjured was material.

Statute Involved.

Section 125 of the Criminal Code (Rev. Stat. Sec. 5392, Act of March 4, 1909, c. 321, Sec. 125, 35 Stat. 1111, 18 U. S. C. A., Sec. 231).

ARGUMENT.

A. Instructions to the Jury under the Two-Witness Rule.

The validity of the rule is not in question. It has been formulated as follows in the case of *Hammer* v. *U. S.*, 271 U. S. 620, 626, 46 S. Ct. 603; 70 Law Ed. 1118, 1120:

> "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury."

The petitioner's contention is that (harmless or unprejudicial error apart) a defendant indicted for perjury is entitled, upon request, to have the trial judge instruct the jury as to the rule.

The Circuit Court flatly rejected this contention, *not limiting its rejection to cases of harmless or unprejudicial error.*

Thus it is in conflict with the following decisions of other Circuit Courts of Appeals:

(a) *Goins* v. *U. S.*, 99 Fed. (2d) 147, where it is said, pages 148-9:

> "On the second point it may be assumed that the requested instruction embodied correctly the rule of law as applied in the federal courts, where it has been uniformly held that the uncorroborated oath of one witness is not enough to establish the falsity of the oath as to which perjury is charged, and that, except where the falsity of such oath is indisputably established, as by documentary evidence, it must be shown by the testimony of at least two witnesses, or by the testimony of a witness corroborated by circumstances proved by independent testimony. *And it may be assumed also that ordinarily the defendant is entitled to have the jury so instructed.*" (Italics supplied.)

(b) *Pawley* v. *U. S.*, 47 Fed. (2d) 1024, 1036, where it is said (after quoting the two-witness rule from *Hammer* v. *U. S., supra*):

> "In a proper case, therefore, it is the duty of the court to give an instruction embodying this principle of law, if timely requested."

(c) *Allen* v. *U. S.*, 194 Fed. 664, 668.

The court below went further in its opinion. It said (R. 195):

> "Considered from the standpoint of the jury's task the interjection of the rule into their deliberations

would impede rather than aid them in reaching a right decision upon the sole issue with which they are concerned, the guilt or innocence of the defendant."

Jones, J., in his dissenting opinion (R. 203) rejected this reasoning, posing the rhetorical question why a jury should not be instructed as to the law by which they should be guided in testing whether the required quantum of credible proof had been produced.

Opposed also to the majority opinion's view of the question is Wigmore's Quotation from Best's Evidence (Wigmore on Evidence, 2d Ed. p. 322) analyzing and stating the foundation for the rule and emphasizing its "great objects".

Jones, J., in his dissenting opinion also pointed out the analogy between treason and perjury cases, citing Wigmore, 3rd Ed., Vol. 7, Sec. 2039, for the proposition that in treason cases the similar two-witness rule means that the two witnesses must be *effective* witnesses, i. e., they must both be believed by the jury.

It is patent that in a perjury case, where the required two witnesses appear and testify, the jury may believe one and not the other; but in their ignorance of the requirements of the rule, convict, nevertheless, with the consequence that the rule is ignored, and the defendant deprived of the protection which the rule is designed to afford.

It is important to note that had not Bard, J., completely misunderstood the true meaning of the decision of the Supreme Court of the United States in *Goins* v. *U. S.*, 306 U. S. 622, he would not have concurred with Maris, J., and the conviction would have been set aside.

For Judge Bard specifically stated that he based his concurrence principally on the opinion in the *Goins* case.

The Supreme Court in the *Goins* case based its per curiam affirmance solely and specifically on the ground that the District Court's failure to instruct as to the two-witness

rule could not have prejudiced the petitioner (under the peculiar facts of that case).

But to Judge Bard that meant—and he was careful so to state—that in no case or under any circumstances is a trial judge required so to instruct the jury, because he felt that failure to instruct (since it might conceivably lead to the defendant's acquittal) would *always* be highly prejudicial. And since in the *Goins* case the Supreme Court had held that failure to instruct was not prejudicial, Judge Bard concluded that a trial judge is *never* required so to instruct.

It is contended that what Judge Bard failed to realize was that the decision in the *Goins* case means that the defendant was not prejudiced *under its own particular facts;* and that while failure to instruct was error, the error was harmless.

To demonstrate the applicability of what has been said, the petitioner respectfully directs the attention of your Honorable Court to the following:

The crux and heart of the perjury case lay in the question whether Weiler was only the nominal purchaser for Roatche's benefit, or whether he was the actual purchaser. This in turn depended upon the factual question whether he had loaned the money to Roatche for the purchase of the tires.

If in truth Weiler were merely financing the transaction, if he were the nominal purchaser only, if he loaned the money to Roatche and Roatche repaid him, then Weiler was not testifying falsely in stating that he did not purchase tires in March of 1942.

But the only witness for the Government in the trial of the perjury case who testified that no loan was made was Roatche. On this point, the proofs boil down to oath against oath—Roatche's testimony against Weiler's. It is to be observed that other testimony for the Government related only to the order given by Weiler for the purchase of the

tires, and the delivery of the tires to Evans *at Paulsboro, New Jersey—not* Weiler's place of business. Such other testimony had no probative value with regard to the point at issue, for Weiler conceded freely at the O.P.A. trial that he had given the order. This testimony could not by its nature resolve the question whether Weiler was the actual or only the nominal purchaser. Thus, the requirements of the two-witness rule were not satisfied, there being no corroboration of the point mentioned.

Or, taking the view of the dissenting judge below, the jury may well have accepted and believed *only* the testimony of the principal witness; and, rejecting all other testimony, convicted, nevertheless, in violation of the rule of which they were ignorant.

But it is impossible to probe the minds of the jurors and know what they rejected and what they accepted. This difficulty would not arise if the jury had been properly instructed. Error in failing to instruct, therefore, was harmful and prejudicial.

This question—i.e., whether a trial judge need *never* instruct—has not been settled by the Supreme Court of the United States.

It is contended that the decision of the Circuit Court of Appeals for the Third Circuit, hinging (since there was a dissent) upon the concurrence of Bard, J., is in conflict with the *Goins* case in the Supreme Court.

B. The Nature of the Indictment and Proofs Cannot Support the Conviction.

Weiler testified upon cross-examination that he did not purchase tires in March, 1942. It then developed that at that time he had arranged a purchase of tires and paid for them. He explained this transaction by testifying further that he was the nominal purchaser only; that he had advanced the money for the tires, but only as a loan to

Roatche, who was the real purchaser; that Roatche had repaid the loan; and that his, Weiler's connection with the transaction was merely that of one who financed it for another. (This is testimony given at the O.P.A. trial.)

The general rule is that perjury will not be predicated upon false statements corrected before submission of the case in which made (48 C.J. 828 and cases there cited).

In applying an extension of this rule, the Circuit Court of Appeals for the Eighth Circuit, in *Fotie* v. *U. S.*, 137 Fed. (2d) 831, 840, set aside a conviction of perjury where, in proving inconsistent admissions and contradictory statements of one indicted, the Government also proved the qualifications and explanations which accompanied the great majority of them.

So here. The indictment in the case at bar did not content itself with charging that Weiler falsely testified that he had not purchased the tires in March, 1942, knowing the truth to be otherwise. The indictment set forth in addition, Weiler's further testimony consisting of explanations and qualifications of his first statement.

Thus the Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with the one rendered by the Eighth Circuit on the same matter.

This is an important question; for it is patent that a judicial investigation holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not, and that this inducement would be destroyed if a witness could not correct a false statement except by running the risk of being indicted and convicted for perjury.[1]

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[1] *Brannen* v. *State*, 94 Fla. 656, 114 S. 429, 431; *Peo.* v. *Gillette*, 126 App. Div. 665, 673, 11 N. Y. S. 133, 22 N. Y. Cr. 400.

"The false assertion, after being explained or corrected by the witness, formed no part of his testimony; and cannot be brought forward to sustain a plea of justification charging him with perjury:" *Henry* v. *Hamilton*, 7 Blackf. (Ind.) 506, 509.

Search has not revealed that the Supreme Court of the United States has settled this important question of federal law.

C. The Question of Materiality.

The Court below did not question the rule that a conviction for perjury must be grounded upon material matter, but held material the subject matter of the testimony.

In the earlier O.P.A. case, Weiler and Evans were tried for acts committed prior to January 4, 1942 (submitting a false statement to the United States as to transactions involving the sale and transfer of tires and tubes); and upon cross-examination the Trial Judge and the United States Attorney developed a transaction occurring two months later—in March 1942: a transaction allegedly involving a purchase of tires by Weiler, and an alleged violation of the regulations requiring that the transaction be reported: in other words, an actionable criminal offense.

This means that in an attack upon the credibility of the witness the Government was permitted to inquire into a possible criminal offense of the defendant, other and subsequent to those charged in the indictment, for which possible offense there had been neither indictment nor conviction.

But in *Melaragno* v. *U. S.*, 88 Fed. (2d) 264 (3rd Cir.), Opinion by Maris, J., a conviction was reversed because the Government upon cross-examination inquired of the defendant whether he had been convicted and sentenced for a prior misdemeanor (not a *crimen falsi*); and in *Verro* v. *U. S.*, 95 Fed. (2d) 504, (3rd Cir.) a similar conclusion was reached where cross-examination concerning *prior arrests was permitted*—also where no moral turpitude, felony or *crimen falsi* was involved.

Cross-examination as to subsequent acts not involving

moral turpitude, etc., being *a fortiori* improper, it follows that the court below has rendered a decision in conflict with its own prior decisions on the same matter without overruling them.

Since such instances of permitted cross-examination frequently arise, this becomes an important matter of federal law. Permitting such cross-examination erases all limits or bounds to the concept of materiality as a basis for prosecution in perjury cases. Moreover, the inquiry and the testimony elicited thereby were such that they could not conceivably influence the decision of the jury in the O.P.A. case; hence, failing to meet the definition of materiality in the Federal Perjury Statute, they could not be used as a basis for indictment or conviction of perjury.

Search has failed to reveal that the question has been settled by the Supreme Court of the United States.

Conclusion.

It is, therefore, respectfully submitted that for the foregoing reasons your Honorable Court should grant the petition for certiorari.

Respectfully submitted,

HIRSH W. STALBERG,
PETER P. ZION,
Attorneys for Petitioner.